

Internal Revenue Service
memorandum

date: OCT 07 1991

to: Director, Internal Revenue Service Center
Kansas City, MO
Attn: Entity Control

from: Technical Assistant
Employee Benefits and Exempt Organizations

subject: CC:EE:3 - TR-45-1528-91
Railroad Retirement Tax Act Status

Attached for your information and appropriate action is a copy of a letter from the Railroad Retirement Board concerning the status under the Railroad Retirement Act and the Railroad Unemployment Tax Act of:



We have reviewed the opinion of the Railroad Retirement Board and, based solely upon the information submitted, concur in the conclusions that [REDACTED] is not an employer under the RRA and the RUIA; that [REDACTED] Company became an employer under the RRA and the RUIA effective [REDACTED]; and that [REDACTED], which assumed all of the former assets and business of [REDACTED] as of the date of its incorporation, [REDACTED], became an employer under the RRA and the RUIA. We also concur in the Board's opinion that [REDACTED] was not an employer under the RRA and the RUIA, prior to its being absorbed by [REDACTED]. [REDACTED] should file a Form CT-1 for [REDACTED] and subsequent years and Forms 941-E should be filed for the appropriate periods. [REDACTED] should file a Form CT-1 for [REDACTED] and subsequent years and Forms 941-E should be filed for the appropriate periods.

(Signed) Ronald L. Moore

RONALD L. MOORE

Attachment:
Copy of letter from Railroad Retirement Board

08975

cc: Mr. Gary Kuper, IRS, 200 S. Hanley, Clayton, MO 63105

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 RUSH STREET
CHICAGO, ILLINOIS 60611

BUREAU OF LAW

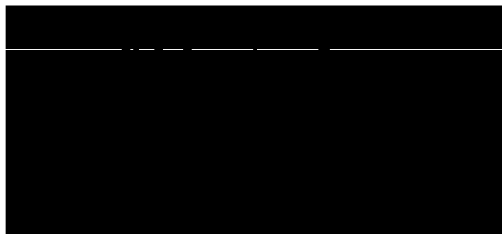
Assistant Chief Counsel
(Employee Benefits and
Exempt Organizations)
Internal Revenue Service
1111 Constitution Avenue., N.W.
Washington, D.C. 20224

AUG 28 1991

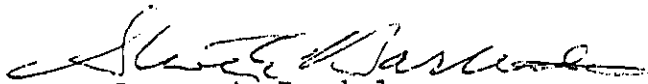
Attention: CC:IND:1:3

Dear Sir:

In accordance with the coordination procedure established between the Internal Revenue Service and this Board, I am enclosing for your information a copy of an opinion in which I have expressed my determination as to the status under the Railroad Retirement and Railroad Unemployment Insurance Acts of the following:



Sincerely yours,


Steven A. Bartholow
Deputy General Counsel

Enclosure

UNITED STATES GOVERNMENT

RAILROAD RETIREMENT BOARD

MEMORANDUM

AUG 12 1991

TO: Director of Research and Employment Accounts

FROM: Deputy General Counsel

SUBJECT: [REDACTED]

Employer Status

This is in reference to a memorandum from the Chief of Compensation and Certification which transmitted to me that office's file on the above-named companies and requested me to take appropriate action to obtain information necessary in order to make an employer status determination.

In letters dated [REDACTED], and [REDACTED], [REDACTED], of [REDACTED] (now [REDACTED]), has, together with certain telephone conversations which [REDACTED] has had with a member of my staff, provided enough information so that a determination may be made with respect to each of the above-captioned companies, none of which has previously been held to be an employer under the Railroad Retirement Act (RRA) and the Railroad Unemployment Insurance Act (RUIA).

In his letter of [REDACTED] [REDACTED] stated that the [REDACTED], which in [REDACTED] changed its name to [REDACTED], is a non-carrier incorporated under Ohio law and is solely owned (except for necessary Directors' qualifying shares) by [REDACTED] an individual. [REDACTED] stated that [REDACTED] has no employees. [REDACTED] owns all of the stock (except for Directors' qualifying shares) in the [REDACTED] the [REDACTED], and the [REDACTED].^{1/} [REDACTED] stated that each of these three railroads is incorporated in the State of Ohio. He enclosed maps of these railroads with his letter.

^{1/} The [REDACTED] (B.A. No. [REDACTED]) is an employer covered under the Acts, with service creditable from [REDACTED] to date. [REDACTED] is an employer with service creditable from [REDACTED] to date. [REDACTED] is an employer with service creditable from [REDACTED] to date.

Director of Research and Employment Accounts

[redacted] stated that [redacted], [redacted] ([redacted]'s wife) and he serve as the Board of Directors of [redacted], [redacted], [redacted], and [redacted].

The [redacted] owns a [redacted]-mile rail line in [redacted] Ohio and operates over [redacted] miles of railroad. [redacted] stated that the difference between mileage owned and operated is due to trackage rights over other railroads.

The [redacted] owns no line, but operates [redacted] miles of road in [redacted] Ohio as the designated operator of rail lines owned by the State of Ohio.

The [redacted] owns no line and operates [redacted] miles of road in [redacted] Ohio. The [redacted] is the designated operator of a rail line owned by the [redacted] ([redacted]), a non-carrier subsidiary of the [redacted] ([redacted]).^{2/}

[redacted] stated that [redacted] was a sole proprietorship owned by [redacted]. According to [redacted], [redacted] was a non-carrier and had the following two principal business activities:

1. Leasing equipment to railroads, including the [redacted], [redacted], and [redacted]. Equipment leases in some instances provided for [redacted] to maintain the leased equipment. Equipment leased included locomotives, freight cars, maintenance of way equipment, and highway vehicles.
2. Operation of a non-common carrier seasonal excursion passenger service.

[redacted] stated that [redacted] was a non-carrier sole proprietorship owned by [redacted] and that its sole purpose was to engage in general construction activities. He stated that the company had no contracts and was dormant with no employees, but that it had bid on a project of track rehabilitation of private sidetracks owned by a coal mining company.

^{2/} [redacted] and [redacted] have not been held to be employers under the Acts. You may wish to investigate the possible employer status of these companies.

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In his letter of [REDACTED], [REDACTED] stated that [REDACTED] commenced business in [REDACTED] and [REDACTED] commenced business in [REDACTED].^{3/} [REDACTED] was incorporated on [REDACTED] and assumed all of the assets and business of [REDACTED] and [REDACTED]. [REDACTED] subsequently stated that [REDACTED] owns all the stock (except for Director's qualifying shares) in [REDACTED]. [REDACTED] further stated that in addition to leasing to [REDACTED], [REDACTED], and [REDACTED], [REDACTED] and its predecessors have "leased equipment to the [REDACTED], the [REDACTED], the [REDACTED], and the [REDACTED]"^{4/} and that [REDACTED] "stands ready to lease to others at any time." He also stated that "[a]pproximately [REDACTED]% of the asset value of [REDACTED] is leased to the [REDACTED], [REDACTED], and [REDACTED]. Currently about [REDACTED]% of asset value is leased to other railroads" and that "[t]he [REDACTED], [REDACTED], and [REDACTED] own or have owned freight cars, maintenance of way equipment, shop equipment, and/or highway equipment. * * * [REDACTED] is responsible for 'heavy' repairs on its leased equipment. [REDACTED], [REDACTED], and [REDACTED] provide ordinary running repairs and maintenance [on equipment leased to them by [REDACTED]]. Finally, [REDACTED] stated that "[REDACTED] (and predecessors) is a non-carrier whose principal business is leasing equipment to rail carriers and others."

Section 1 of the RRA defines an employer to include the following:

"(i) any express company, sleeping car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49;

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *." (45 U.S.C. §231(a)(1)(i) and (ii)).

3/ In a telephone conversation with a member of my staff on [REDACTED], [REDACTED] stated that [REDACTED] never commenced operations.

4/ [REDACTED] ([REDACTED]), [REDACTED] ([REDACTED]), and [REDACTED] and [REDACTED] ([REDACTED]) have all been held to be employers under the Acts. In Legal Opinion [REDACTED], [REDACTED] was held not to be an employer covered by the Acts.

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The RUIA contains the same definition. *

Section 202.7 of the Board's regulations explains when service is in connection with railroad transportation:

"The service rendered or the operation of equipment or facilities by persons or companies owned or controlled by or under common control with a carrier is in connection with the transportation of passengers or property by railroad * * * if such service or operation is reasonably directly related, functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as common carrier by railroad * * *." (20 CFR 202.7).

According to the information provided by [REDACTED], [REDACTED] and [REDACTED] are owned and controlled by [REDACTED]. Previously, [REDACTED] and [REDACTED] were sole proprietorships owned by [REDACTED]. [REDACTED] is the sole owner of the stock of [REDACTED] and of [REDACTED], except for the Directors' qualifying shares. In addition, since [REDACTED] owns all of the stock (except for Directors' qualifying shares) of [REDACTED], [REDACTED], and [REDACTED] and [REDACTED] is one of the Directors of each of these corporations, [REDACTED] and [REDACTED], [REDACTED] are under common control with railroad carrier employers, as were [REDACTED]. The question in regard to employer status under the RRA and RUIA then becomes whether any of the companies in question provide service in connection with railroad transportation.

[REDACTED] stated that [REDACTED] is a non-carrier and has no employees. In a conversation with a member of my staff on [REDACTED], he indicated that it is a holding company established to hold the stock in the three railroad companies. Based upon the information provided, it does not appear that [REDACTED] provides any service in connection with railroad transportation. It is therefore my opinion that [REDACTED] is not an employer under the RRA and the RUIA.

[REDACTED] leases equipment, including locomotives, freight cars, maintenance of way equipment and highway vehicles, to railroads, including the [REDACTED], [REDACTED], and [REDACTED], as did its predecessor, [REDACTED]. In addition, [REDACTED] in some instances maintains and repairs the equipment which it leases.

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Thus, the situation involved here is clearly distinguishable from that found in Itel Corp. v. United States Railroad Retirement Board, 710 F. 2d 1243 (7th Cir. 1983), where the court read section 1(a)(1)(ii) of the Act as applying to services covered by the Interstate Commerce Act or where the related entity exists primarily to serve the rail carrier affiliates and where its purpose is to remove employees from coverage under the Railroad Retirement Act. Itel, at 1248.

In Itel, only about 12 percent of the company's railcars were leased by Itel's Rail Division to its subsidiary railroads; in the present case, █% of █'s asset value is leased to its railroad affiliates and a total of █ (█%) of it services the rail industry directly.

In a later decision, Standard Office Building Corporation v. U.S., 819 F. 2d 1371 (7th Cir. 1987), the Seventh Circuit was somewhat critical of its reading of section 1(a)(1)(ii) in the Itel decision.

In refusing to accept the argument of Standard Office Building Corporation that section 1(a)(1)(ii) of the Act applies only to "the 'direct' performance of railroad service by operating employees," the Seventh Circuit stated that:

"The distinction is unrelated to the purpose of the statute because the words 'performs any service ... in connection with [rail] transportation' were intended to exclude services unrelated to rail transportation, such as operating an amusement park open to the public on land owned by the railroad and those who back up the former group. The Act covers 'substantially all those organizations which are intimately related to the transportation of passengers or property by railroad in the United States.' S. Rep. No. 818, 75th Cong., 1st Sess. 4 (1937)." Id., at 1376.

The Court in Standard Office Building concluded that the best approach to resolving questions as to whether a service performed by an affiliated entity is a service in connection with rail transportation "is one that will minimize corporate reorganization designed to avoid railroad retirement tax liability and will protect reasonable expectations." Id., at 1379. In making its determination, the Seventh Circuit looked to other factors including the degree to which the company services the rail carrier affiliate(s). Id., at 1379-1380.

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In his letter of [REDACTED], [REDACTED] stated that [REDACTED]'s "principal business is leasing equipment to rail carriers and others," that "[REDACTED] % of the asset value of [REDACTED] is leased to the [REDACTED], [REDACTED], and [REDACTED]," its rail carrier affiliates, and that "[REDACTED] % of asset value is leased to other railroads", for a total of [REDACTED] % of asset value. Since [REDACTED] leases to railroads, including the railroads with which it is under common ownership and control, equipment which is intimately connected with railroad operations and sometimes maintains that equipment, as [REDACTED] did previously, and since the equipment so leased comprises [REDACTED] of its total assets, it is my opinion that [REDACTED] provides service in connection with railroad transportation, as did its predecessor, [REDACTED]. It is therefore my opinion that [REDACTED] became an employer under the RRA and the RUIA with respect to the leasing of such equipment effective [REDACTED], the beginning date of operations of the [REDACTED], and that [REDACTED], which assumed all of the former assets and business of [REDACTED] as of the date of its incorporation, [REDACTED] became an employer under the RRA and RUIA with respect to the leasing of such equipment effective on that date. See section 202.8 of the Board's regulations.

According to the information provided by [REDACTED], [REDACTED] was established in [REDACTED] to engage in general construction activities but as of the date of his letter of [REDACTED], had no employees, no contracts, and was dormant, and it apparently never actually operated. According to [REDACTED]'s letter of [REDACTED], it has now been absorbed by [REDACTED], and no longer exists as a separate entity. Since it does not appear that [REDACTED] provided service in connection with railroad transportation, it is my opinion that it was not an employer under the RRA and the RUIA during the period of its existence.

Appropriate Form G-215's are attached giving effect to the foregoing.



Steven A. Bartholow

Attachments

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0510D/C.2105-90